United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

with Affidavit

74-1280

To be argued by
JOSEPH P. MARRO

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

September Term, 1973

Docket Nos. 74-1280, 74-1281

CHIM MING,

Plaintiff-Appellant,

—v.—

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

LAM YIM YIM, et al.,

Plaintiffs-Appellants,

—v.—

SOL MARKS, as District Director of the Immigration and Naturalization Service for the District of New York,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

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DEFENDANTS-APPELLEES' BRIEF

Statement of the Issues

1. Whether the District Court was correct in holding that the appellants, aliens who are in the United States illegally, were not entitled to the protections of the United

Nations Protocol Relating to the Status of Refugees, because the Protocol specifically applies only to aliens lawfully in a country.

2. Whether the District Court was correct in holding that the Immigration and Naturalization Service was not required to forward all requests for political asylum to the Department of State where the Department had established a classification of cases that did not require its individual consideration.

Statement of the Case

This is an appeal from an order and judgment of the Honorable Robert L. Carter, United States District Judge for the Southern District of New York. On November 27, 1973, Judge Carter rendered an opinion and order denying the appellants' motion for a preliminary injunction and granting the Government's motion for summary judgment in its favor (9a).[1] Judge Carter's opinion is reported below at 367 F. Supp. 673 (S.D.N.Y. 1973). Thereafter, judgment was entered in accordance with that decision on December 4, 1973.

The appellants commenced these actions on February 5, 1973 and March 30, 1973 by the filing of their respective complaints. They each seek a declaratory judgment that they are political refugees entitled to the protections of the United Nations Protocol Relating to the Status of Refugees (hereinafter, the "Protocol") and to permanently enjoin the Immigration and Naturalization Service (hereinafter the "Service") from enforcing their deportations to Hong Kong. Immediately upon filing the complaints, the appellants obtained orders to show cause, which brought on the motions for a preliminary injunction. The Government consented to a temporary stay of deportation until the motions for

[1] References followed by the letter "a" refer to pages in the Plaintiffs-Appellants' Appendix, attached to their brief.

the preliminary injunction were heard. Thereafter, the Court below denied the appellants' motion and granted summary judgment in favor of the Government, dismissing the complaints. The basis of Judge Carter's decision was that the appellants were not entitled to the protections of the Protocol because they were in the United States illegally and Article 32 of the Protocol denies protection to such aliens.

Statement of the Facts

These two actions are but two of numerous other identical actions which raise the same issues. By agreement between counsel for the respective parties, the named appellants were selected as representatives of all these cases and both sides agreed to be bound by the final decision entered herein.[2]

With respect to the two named appellants, the facts are not in dispute and may be summarized as follows:

Chim Ming

Appellant, Chim Ming, is an alien, a native and citizen of the People's Republic of China (hereinafter "Mainland China"). He resided in Mainland China from his birth in 1919 until 1955 when he entered Hong Kong. Thereafter, he obtained Hong Kong seaman's documents and was employed as a seaman from 1955 until April 1967 when he deserted his vessel in Newark, New Jersey. His wife and three children remained in Mainland China and another daughter resides in Hong Kong.

At the time of his admission to the United States, Chim Ming was permitted to enter as a nonimmigrant crewman

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[2] Judge Carter, in the appendix to his decision, also dismissed the complaints in those identical actions pending at the time of his decision (31a).

and was authorized to remain for the period of time his vessel remained in port, but not to exceed 29 days. Section 252 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1282. He did not depart as required and has obtained employment as a dishwasher while remaining here unlawfully.

On or about January 26, 1968, Chim Ming was apprehended by officers of the Service and deportation proceedings were commenced against him. At his deportation hearing, the alien conceded that he was deportable for having remained in the United States without authority and made no application for any form of discretionary relief. Accordingly, the Special Inquiry Officer,[3] by his decision and order of February 9, 1968, found the alien deportable as charged and directed that he be deported to Hong Kong. Chim Ming was then released on bond and when he failed to surrender for deportation, a warrant for his arrest was issued.

After numerous unsuccessful attempts to locate the alien, he was again apprehended in New York City. Chim Ming was then notified that arrangements for his deportation to Hong Kong had been made for December 1, 1972. On November 24, 1972, Chim Ming, as a last attempt to avoid deportation, submitted to the Service a request for political asylum. On December 1, 1972 the alien was interviewed by an officer of the Service concerning his application for asylum. At the conclusion of that interview, a written report was prepared. In accordance with the procedures in effect at that time, the information was forwarded by letter from the District Director of the Service to the Department of State for an advisory opinion. By letter of December 20, 1972, the Department of State responded that Chim Ming failed to establish that he was a political refugee; the State Department further concluded that his deportation to Hong Kong would be appropriate (3a). As a result, Chim Ming

[3] Now called an Immigration Judge.

was notified by the Service on January 16, 1973 that his request was denied. Additionally, he was informed that he could submit a request for temporary withholding of deportation to Hong Kong pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h), if he could establish that he might be subject to persecution upon his return to Hong Kong (4a). However, Chim Ming concedes that he would not be subject to persecution in Hong Kong.

Lam Yim Yim

The appellant, Lam Yim Yim, is also an alien, a native and citizen of Mainland China. He resided in Mainland China from his birth in 1933 until 1961 when he entered Hong Kong. His wife and five children remain in Mainland China as do his parents. He claims to have remained in Hong Kong for about three months in 1961 until he obtained seaman's documents. He maintains an address in Hong Kong where he claims to rent a room from a villager.

Lam Yim Yim was admitted to the United States on May 19, 1972 as a non-immigrant crewman and was also authorized to stay for the period of time that his vessel remained in port, but not to exceed 29 days. Section 252 of the Act, 8 U.S.C. § 1282. Shortly after his entry, he deserted his ship in Duluth, Minnesota and remained unlawfully in the United States. On or about September 21, 1972, he was apprehended in New York City by Service officers pursuant to a routine field investigation. On September 22, 1972, deportation proceedings were commenced against him. At his deportation hearing held on October 3, 1972, the alien, represented by counsel, conceded deportability and requested only the privilege of voluntary departure. The Special Inquiry Officer by his decision of October 3, 1972 found him deportable but granted his request to voluntarily depart by November 15, 1972. In the event he were not to depart by that date, the Special Inquiry Officer entered an alternate order of deportation to Hong Kong. The alien declined to appeal this decision.

Lam Yim Yim did not depart the United States as he had promised and the alternate order of deportation became effective. A warrant of deportation was issued against him on March 16, 1973. On March 27, 1973, Lam, as a last attempt to avoid deportation, submitted to the Service a request for political asylum. A hearing was held on his application before an officer of the Service on April 2, 1973. Following the conclusion of this hearing, a written report was prepared. His request for asylum was not forwarded to the Department of State because, following consultation between the Department and the Service, it was agreed that last minute requests by Chinese who are being deported to Hong Kong could be handled by the Service, absent special circumstances (5a). This change in procedure was communicated in the Service by a memorandum from its Associate Deputy Regional Commissioner dated February 13, 1973 (7a). Accordingly, on April 9, 1973, Lam Yim Yim was advised that his request was denied since he would not be subject to persecution in Hong Kong and was not entitled to political asylum. He was, however, advised of his right to submit a request for temporary withholding of deportation to Hong Kong on account of persecution pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h) (8a). Lam Yim Yim also concedes that he would not be subject to persecution in Hong Kong.

On May 17, 1974, this Court entered an order consolidating both cases for appeal.

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952) as amended:

Section 203, 8 U.S.C. § 1153—

(a) Aliens who are subject to the numerical limitations specified in Section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * * *

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in Section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; . . .

Section 243, 8 U.S.C. § 1253—

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Treaty

Convention Relating to the Status of Refugees (1951):

Article 1—

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

* * * * *

(2) . . . owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Article 32—

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.

Article 33—

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

ARGUMENT

POINT I

The Court below was correct in holding that the appellants are not entitled to the protections of the Protocol.

a. Accession to the Protocol did not expand the rights of aliens as they existed under our immigration laws

The thrust of the appellants' contention is that they are political refugees who fled Mainland China in the late 1950's and early 1960's. As a result, they now argue that they are entitled to the benefits conferred by the Protocol. The appellants alleged jurisdiction under 5 U.S.C. §§ 702-706, 8 U.S.C. § 1329 and 28 U.S.C. § 2201. The Government did not contest this issue below and the District Court appropriately determined that it had jurisdiction under 8 U.S.C. § 1329 (10a). *Buckley* v. *Gibney,* 332 F. Supp. 790 (S.D. N.Y. 1971), *aff'd,* 449 F.2d 1305 (2d Cir. 1971), *cert. denied,* 405 U.S. 919 (1972); *Kan Kan Lin* v. *Rinaldi,* 361 F. Supp. 177 (D. N.J. 1973), *aff'd,* — F.2d — (3d Cir., decided March 25, 1974).

In support of their position, appellants argue that they satisfy the definition of a "refugee" as found in Article 1 of the Protocol.[4] Additionally, they contend that the decision to deny them asylum under the Protocol, was made in their cases without regard to this definition.

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[4] Article 1(A)(2) defines "refugee" as

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

[Footnote continued on following page]

Although it is argued that decisions to grant or deny political asylum under the Protocol are based solely on whether an applicant satisfies the definition of a refugee, the appellants presented no such evidence below. Moreover, it is obvious that such claims, when timely presented, can be considered on the basis of whether the applicant is in fact a political refugee as defined in the Protocol. However, in the present case, the claims of the appellants were submitted more than thirteen years after they left Mainland China.[5] To require the Government to conduct an inquiry and obtain evidence as to the circumstances of their leaving China more than a decade ago is simply an impossible task. Notwithstanding the appellants' laches, the Government assumed for purposes of this case that the appellants are refugees within the meaning of the Protocol and then proceeded to the other provisions of that treaty in order to determine the applicability of the Protocol to the appellants herein.

Thus, even if the appellants fall within the literal definition of a refugee, whether they are entitled to the benefits and protections of the Protocol must be governed by reference to the subsequent articles of that treaty. The Government submits that the Court below was correct in finding that the Protocol must be construed in the light of our immigration laws and its historical background, and that the appellants were not entitled to the benefits of the Protocol because they were in the United States unlawfully and therefore, excluded from protection by Article 32 (26a).

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country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it."

[5] In the case of Chim Ming, he left Mainland China in 1955 and submitted his claim for political asylum on November 24, 1972. Lam Yim Yim, left Mainland China in 1961 and submitted his claim on March 27, 1973.

In order to best understand this treaty and its interrelation with our immigration laws, a brief discussion of the historical background is essential. The Protocol[6] was approved by the Senate on October 4, 1968 and entered into force with respect to the United States on November 1, 1968. Article 1 of the Protocol adopts by reference Articles 2 through 34 of the 1951 Geneva Convention Relating to the Status of Refugees.[7]

Because the United States has been practically unsurpassed among nations in accepting refugees and granting asylum, it was unnecessary to promulgate a whole new body of law in order to implement the Protocol when it was adopted. While some internal procedures dealing with refugees have been modified through the years, including the years since the adoption of the Protocol, as a general rule, officials of the Service have been able to rely on the operating instructions, regulations, and statutes already in existence at the time the Protocol became law. Being later in date, the Protocol would supersede prior acts of Congress insofar as inconsistent with its terms. *Cook* v. *United States,* 238 U.S. 102, 118 (1933). However, it must clearly appear from the terms of the treaty that Congress intended to supplant, in whole or in part, an earlier enactment. *United States* v. *Lee Yen Tai,* 185 U.S. 213, 221 (1902). Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier enactment by implication, unless there is a "positive repugnancy" and the later one is so explicit as to show that it was intended to displace the prior statute. *Wood* v. *United States,* 16 Pat. 342, 363, 10 L. Ed. 987, 995 (1842); *Frost* v. *Wenie,* 157 U.S. 46, 58 (1895).

A substantial indication that the Protocol did not enlarge the rights of aliens as they existed under the immigration laws is evidenced by the interchange between Senator

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[6] 19 UST 6225, TIAS 6577.
[7] 19 UST 6259, TIAS 6577.

Sparkman, Chairman of the Senate Committee, and Mr. Lawrence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State, the State Department representative speaking in favor of the Protocol:

> Senator Sparkman: I want to make certain of this: Is it absolutely clear that nothing in this protocol, first, requires the United States to admit new categories or numbers of aliens?
>
> Mr. Dawson: That is absolutely clear.
>
> Senator Sparkman: And no requirement of new categories or numbers of aliens?
>
> Mr. Dawson: That is correct, sir.

Additionally, the full statement of Mr. Dawson, to the Senate Committee, makes it abundantly clear that accession to the Protocol was not intended or designed, nor did it commit a "Contracting State to enlarge its immigration measures for refugees." The existing deportation provisions of the Immigration and Nationality Act were deemed consistent with Articles 32 and 33 of the Protocol and the Attorney General would be able to administer the provisions of both "in conformity with the Protocol, without amendment of the Act." (*Senate Executive Report* No. 14, 90th Cong., 2nd Sess., p. 6).

Elsewhere in the testimony before the Senate Committee, a question was raised as to the need for accession to the Protocol, in view of the provisions of Section 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7), which is designed to admit limited numbers of refugees (10,200 per year) and in view of earlier testimony before the committee indicating that refugees in the United States were already guaranteed virtually all of the rights in the Convention through legislative enactments going back to 1947.

Senator Sparkman: Then what is the necessity of this so far as the United States is concerned?

Mr. Dawson: I cannot say that it is a necessity . . . there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants . . . the foreign policy interests that would be inherent in our accession form the basis for our strong recommendation that the United States accede . . . they extend the image of the United States as a nation concerned with the persecuted and with the individual at a time when this is ever more important. . . .

. . . it will enhance our diplomatic competence and our diplomatic effort to try to produce more and better acceptance of humans and civilized standards in other countries for refugees. These conduce to solutions to broader problems and to the removal of tensions and in the end to the preservation of peace. (*Senate Executive Report, supra,* p. 10).

* * * * *

Accession would convey in a conspicuous form, to the rest of the world—free and unfree—the continuing image of our national tradition of concern and solicitude for the homeless and persecuted. Even though the United States already meets the standards of the Protocol, formal accession would greatly facilitate our continuing diplomatic effort to promote higher standards of treatment for refugees and more generous practices on the part of countries whose approach to refugees is far less liberal than our own (*Senate Executive Report, supra,* p. 7).

Additionally, the statement of Mr. Dawson submitted to the Senate again emphasizes that accession to the Protocol will not conflict with or expand our immigration policy. In that statement, Mr. Dawson points out that

> ". . . [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act." (*Senate Executive Report, supra,* p. 6).

Finally, President Johnson, at the time of submission of the Protocol to the Senate, stated:

> "It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those feeling persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere. This impetus would be enhanced by the fact that most refugees in this country already

> enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries." *Senate Executive K.* 90th Cong., 2d Sess. at 111.

Thus it is evident that accession to the Protocol was not intended nor designed to change, or to impinge upon, the existing immigration laws of this country, or to increase the numbers or categories of aliens in the United States, in a manner not contemplated by the Act and existing law.

b. Article 32 of the Protocol specifically sanctions the deportation of aliens residing in a country without authority

Under the terms of Article 32 of the Protocol, a Contracting State is prohibited from expelling a refugee who is "lawfully in their territory."[8] The issue therefore resolves itself into whether the aliens are unlawfully in a country and therefore precluded from the benefits of the Protocol. Clearly, whether an alien is in the United States lawfully or unlawfully is determinable under the statutes of the country wherein he is located (the United States) and not under the Convention, as indeed the Court below so found (17a). Some guidance to the meaning of the phrase, "lawfully in their territory", is given by the report of the Ad Hoc Committee of the United Nations which drafted these provisions.

> The expression "lawfully within their territory" throughout this draft Convention would exclude a refugee who while lawfully admitted has over-stayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay. (Report, March 2, 1950, para. 4).

* * * * *

[8] Except on grounds of national security or public order.

> However, since some question was raised as to the phrase "lawfully in the territory," the Committee expressed the view that, in any event, a contracting state may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn. (Report dated Aug. 25, 1950, page 11, para. 20).

The view that the determination of whether an alien is lawfully in a country must be resolved by the immigration laws of the particular country is held not only by the Government of the United States but also by the United Nations High Commissioner for Refugees as evidenced in his letter of May 26, 1971, submitted with the Government's affidavit to the Court below, which states in pertinent part:

> "[T]he stay of a refugee who has entered in a regular manner, may subsequently become unlawful. This would for example be the case if the authorities of the country are not prepared to grant him residence beyond the *limited period* for which he was admitted or if they withdraw his residence permission on the ground that he has not complied with the *conditions* for which he was admitted, e.g. to pursue his studies. As long as his stay is 'lawful', even though admitted temporarily, he can only be expelled on grounds of 'national security and public order'. If, however, his stay ceases to be 'lawful' in the circumstances described above, he is no longer 'lawfully in the territory of the Contracting State' and may therefore not invoke the special protection of Art. 32 of the 1951 Convention."

A reading of the entire letter buttresses the Government's arguments regarding the interpretation of the term "unlawful presence in a territory", as it appears to indicate that unless one remains in a nation with the permission of the government, he is unlawfully in that country and may

not invoke the protections of the Protocol. In the present case, of course, no permission was ever given for these aliens to remain in the United States beyond the imited period for which they were granted admission.

In this case, the appellants were both admitted to the United States for a short period of time and in no event to exceed 29 days. However, they exceeded this authorized stay and continued to remain in the United States without permission. The determination of the unlawfulness of their presence in the United States has been determined in each case by the Special Inquiry Officer after an adversary hearing was conducted. While the appellants had the right to appeal this determination to the Board of Immigration Appeals pursuant to 8 C.F.R. § 3.1(b), they did not avail themselves of this administrative remedy and thus were barred from seeking judicial relief as to that determination. *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir. 1962), *cert. denied*, 371 U.S. 921. *Luna-Benalcazar* v. *Immigration and Naturalization Service*, 414 F.2d 254 (5th Cir. 1969); *Arias-Alonso* v. *Immigration and Naturalization Service*, 391 F.2d 400 (5th Cir. 1968); *Arrias* v. *Immigration and Naturalization Service*, 386 F.2d 191 (9th Cir. 1967).[9]

Therefore, as the appellants' presence within the United States is unlawful under our immigration laws, they cannot possibly claim shelter under the Protocol which is directed exclusively towards refugees "lawfully" in a nation. Appellants, in their brief, contend that the term "unlawful" as

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[9] Because the claims to political asylum were not presented promptly, the original finding of deportability not appealed from and because no application for relief from deportation was made under Section 243(h) of the Act, 8 U.S.C. § 1253(h), Judge Whipple, in the identical cases in the District of New Jersey suspected that the applications therein under review were but another type of dilatory tactic. *Kan Ka Lin* v. *Rinaldi*, *supra*, n. 4, at p. 183.

found in the Protocol cannot be interpreted as meaning unlawful as adjudicated by a Special Inquiry Officer at a deportation hearing, or as defined by the laws of the United States. Appellants claim that if this were the case, the treaty would be a nullity. The Government vigorously disagreed with this position as the treaty itself must be examined in its entirety. The Government submits that the primary purpose of the treaty was to insure to persons who are truly refugees that upon their entering a foreign nation, they would be accorded certain basic protections and, most importantly, that the nation would not return them to the country from which they fled, or to a country where they would be persecuted (Article 33). A reading of the Protocol clearly indicates that the bulk of the provisions pertain to various basic human rights which a refugee should possess. Thus, the interpretation of Article 32(1) as proposed by the Government would hardly make the treaty a nullity.[10]

More important, however, are the reports of the Ad Hoc Committee that formulated the Protocol (see pages 15 and 16, *supra*). A reading of portions of those reports clearly indicates that the Committee intended the word "lawfully" to be defined according to the laws of the nation in which the refugee is found. The Committee refers to the phrase "lawfully within their territory" and states that the

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[10] Appellants set forth on page 20 of their brief, three situations where they contend aliens can be in the United States unlawfully and still be here with the permission of the country. Hence, they claim that the term "lawfully" as used in the Protocol is not synonymous with being in a legal status under our immigration laws. However, this argument simply avoids the issue. The fact that an alien may be barred from seeking protection under the Protocol because he is unlawfully in a country does not prevent him from obtaining relief under available provisions of our immigration laws, such as a conditional entrant under Section 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7) or withholding of deportation under Section 243(h) of the Act, 8 U.S.C. § 1253(h). Indeed, the third example cited by the appellants is precisely such a case.

definition was intended to exclude a refugee "who while lawfully admitted has overstayed the period for which he was admitted or who has violated any other condition attached to his admission of stay." Clearly and unequivocally, this language can only be interpreted to mean that the definition of "unlawful" is to be determined with reference to the internal laws of the contracting states. As a matter of fact, the factual situation in the instant cases is identical with the example of "unlawful presence" given by the Committee, as the appellants herein have overstayed the period for which they were admitted. Thus, contrary to the appellants' assertion that their unlawful presence in this country is a "mere technical ground" [11] for denying relief the background and scheme of the Protocol clearly indicate that it was not designed to give refugees broader rights than other aliens to obtain residence in any country of their choosing, but rather to insure that they will not be returned to conditions of persecution.

Article 31 of the Protocol also merits discussion, for it sheds light upon the question presented herein. That provision relates to "Refugees Unlawfully in the Country of Refuge" and characterizes such refugees as those persons who "enter or are present in their territory without authorization." This clause appears to connect the treaty definition of unlawfulness with the status of being in a nation in violation of that nation's immigration laws. More importantly, subsection 2 of that Article implies that such refugees are, as a matter of course, not entitled to remain in the United States, as the language reads that "Contracting States shall allow such refugees a reasonable period and all of the necessary facilities to obtain admission into another country." Thus, the Government submits that the only reasonable and logical interpretation that can be placed upon the term "lawfully in their territory" and the interpretation intended by the authors of the

[11] See page 22 of Appellants' brief.

Protocol, is that which is consistent with the immigration laws of the United States. Moreover, as appellants have been afforded a full adversary hearing under our statutes where a Special Inquiry Officer has made a finding that appellants were unlawfully in the United States, the Government contends that this determination is conclusive and binding. At this point, it should be noted that the appellants, as the record indicates, admitted that they were in the United States unlawfully and waived their right to contest this issue.

Appellants further allege, in vague, sweeping generalities, that the decision to deport them on the basis of their being unlawfully in the United States is arbitrary and capricious as this is the first time that such criterion has been applied.[12] Initially, it should be noted that there is absolutely no proof whatsoever of this allegation, and even if it were true, there is no reason why this issue cannot be now raised for the first time. The Protocol is clear in its language and the fact that the Government may not have had occasion in the past, to consider the issue is of no moment as the Government must comply with the provisions of the Protocol. Moreover, it is the Government's position that the issue of "unlawful presence" is beyond dispute in these cases as this question had been finally adjudicated by the decision of deportability entered by the Special Inquiry Officer.

Appellants also attempt to argue that the recent amendments to the regulations concerning refugee travel documents supports their position. 8 C.F.R. § 223a.3. It is the Government's contention that this regulation deals only with

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[12] Also directly contrary to appellants' argument is the decision of the Board of Immigration Appeals in the case of *In re Dunar, unreported,* Interim Decision, File No. A 14 616 395 (April 17, 1973), where the Board held that an alien who overstayed his authorized admission to this country was here unlawfully and was prevented from claiming the benefits of the Protocol by the language of Article 32 thereof.

the issuance of travel documents to an alien who is a valid refugee and contains language similar to Article 28 of the Protocol. It simply provides a *refugee* who is *lawfully* in a territory with a document to allow him to depart and return to the country where he is residing. Since the appellants are not lawfully in the United States, this regulation would not benefit them. Additionally, the regulation, like Article 28 of the Protocol, permits the issuance of such a document to other aliens in the exercise of discretion. This latter clause would apply to an alien who may be subject to expulsion and deportation but the receiving country refused to accept him. Thus, since he cannot be deported, this method of issuing him a travel document will permit him to depart and return without difficulty.

In an identical action to the present case brought in the Third Circuit, Judge Whipple of the District of New Jersey reached the same conclusion as the Court below. There Judge Whipple held that "It is patently clear that, if the plaintiffs are not lawfully in the United States, they take nothing from the terms of the treaty (361 F. Supp. at p. 183)." Still, later in his decision, Judge Whipple stated, "In addition to the relevant legislative history in the United States Congress [footnote omitted], it seems abundantly clear that the intent of the drafters of the provisions in question was that 'lawfully in the territory' was to be construed as the [Government] suggests." *Kan Kan Lin* v. *Rinaldi, supra,* 361 F. Supp. at 185. Upon appeal to the Third Circuit, the Court in a per curiam opinion stated:

> "The district court concluded, and we agree, that the terms 'lawfully in . . . [the] territory' were intended to require that a refugee under the Protocol be in a country in compliance with the immigration laws of that country. Each of the appellants has had a deportation hearing at which he was found deportable. No appeals were taken from the findings that each was unlawfully present."

Thus, for the reasons stated, Judge Carter was correct in finding that the appellants can derive no benefit from the Protocol since by its very terms, they are excluded from protection as aliens unlawfully in this country.

c. Article 33 authorizes the deportation of aliens to a country where they will not be subject to persecution

Although the District Court did not address itself to Article 33 of the Protocol, the Government argued below that the provisions contained therein would also exempt the appellants from the protections of the Protocol. In Article 33 the contracting parties sanctioned the deportation of an alien as long as his return to such a country would not subject him to the hazards of persecution. Once again, the legislative history of the United States accession to the Protocol shows that the Protocol was construed to be subject to implementation by the deportation machinery of the existing law. On July 25, 1968, in his letter of submittal of the Protocol to the President, the Secretary of State said:

> "As stated earlier, foremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1254 (sic), and it can be implemented within the administrative discretion provided by existing regulations."

Under Section 243(h) of the Act, 8 U.S.C. § 1253(h), the Attorney General is authorized to "withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion." Of

course, the burden to obtain relief under this statute is placed upon the alien, 8 C.F.R. § 242.17(c).

Thus, the State Department and the Service when adjudicating a request for political asylum may properly consider whether the alien will be subject to persecution upon his return. Most certainly, if their conclusion is in the negative, the deportation of the alien would be consistent with Article 33 of the Protocol. However, the alien is given notice of his right to apply for temporary wtihholding of deportation under the provisions of Section 243(h) of the Act, 8 U.S.C. § 1253(h). That this has long been the policy of the Department of State is clear from its letter to the Service of January 22, 1973 wherein it is stated, "There is no likelihood that these aliens will be persecuted within the meaning of the Convention on Refugees if they are deported to Hong Kong. . . ." (5a). Under the present factual situation, since the appellants concededly will not be returned to conditions of persecution there is no compelling humanitarian reason to grant them political asylum. *Siu Fung Luk* v. *Rosenberg,* 409 F.2d 555 (9th Cir. 1969), *cert. denied,* 396 U.S. 801. Accordingly, the denial of the appellants' request for asylum, adjudicated in accordance with the provisions of Article 33 of the Protocol would also be the basis for a proper determination and as such, beyond attack.

POINT II

The Court below was correct in holding that the State Department was not required to individually review all requests for asylum.

Appellant, Lam Yim Yim, argues that the Service acted improperly by denying his claim for asylum without transmitting his request to the Department of State for its recommendation. However, the appellant has failed to provide any authority whatsoever for this contention, as indeed there is none.

As a last minute attempt to avoid, or at least delay, deportation it has become the practice of many Chinese aliens to submit requests for political asylum on the eve of their deportation. These requests are presented to the Service after the deportation proceedings have been concluded and are submitted by aliens who could have applied earlier for this relief or who could have applied at the deportation hearing for withholding of deportation on account of persecution. Section 243(h) of the Act, 8 U.S.C. § 1254(h).[13]

Because of the large volume of these eleventh hour applications, the Department of State, following consultation with the Service, informed the Service by letter on January 22, 1973 of its policy with regard to requests for asylum and authorized the Service to adjudicate certain last minute cases falling within the guidelines set forth by the Department (5a). The criteria contained in the Department's letter applied to citizens of Mainland China who fled to Hong Kong and were being returned to that colony with its approval. However, in cases presenting other special circumstances, the Service would continue to request the opinion of the State Department.

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[13] At the time of Judge Carter's opinion, there were 130 cases pending in this District alone which involved over 250 aliens. Many more cases have been filed pending this appeal.

It is the Government's position that such a policy is indeed appropriate as it obviates the need for repetition of already determined, factually identical cases and allows a more rapid and consistent handling of such requests. Certainly, when fashioning a general policy governing a class of aliens, this Circuit has held that the agency may properly proceed by written or unwritten rules. Cf. *Stellas* v. *Esperdy,* 366 F.2d 266 (2d Cir. 1966), *vacated and remanded on other grounds,* 388 U.S. 462 (1967). Furthermore, as this Court has stated:

> "The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups. The administrator also exercises the discretion accorded him when, after appropriate deliberation, he determines . . . that all persons [similarly situated] . . . shall be ineligible for favorable consideration. . . . Nothing in this offends the basic concept that like cases should be treated similarly and unlike ones differently." *Fook Hong Mak* v. *Immigration and Naturalization Service,* 435 F.2d 728, 730 (2d Cir. 1970).

Moreover, as the Court below noted, it was assumed *arguendo* that the appellants were refugees and therefore the determination by the State Department as to whether Lam Yim Yim is a valid refugee within the definition of the Protocol is irrelevant since the only issue under consideration is whether he is entitled to the protection of the treaty (29a). This determination, we submit, can be made by the Service, the agency to which the application was submitted. As the Court below correctly found, "there is nothing in either the Convention or laws of this country which dictates that the State Department must be the final arbiter of all claim for refugee status" (29a).

Accordingly, the decision not to forward the request for asylum of Lam Yim Yim and others to the Department of State under the circumstances set forth above was appropriate and should not be disturbed.

CONCLUSION

The decision of the Court below should be affirmed and the appeal dismissed.

Respectfully submitted,

May, 1974

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 30th day of May 1974 she served two copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Lebenkoff & Coven, Esqs.,
One East 42nd St.
New York, NY 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this
30th day of May 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975